

DIVISION I

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
KAREN R. BAKER, Judge

CA05-1338

NOVEMBER 8, 2006

CHARLES ROUSE

APPEAL FROM THE PULASKI COUNTY
CIRCUIT COURT
[PDE 03-1031, PDE 03-1032]

v.

APPELLANT

HONORABLE MACKIE MCCLELLAN
PIERCE, JUDGE

VICKIE ROUSE

APPELLEE

AFFIRMED

The dispute in this case arises over the distribution of the proceeds from a wrongful-death settlement. We previously ordered rebriefing in this case in CA 05-1338 (Ark. App. June 14, 2006) because appellant's argument referred to documents relied upon in evidence at trial, including references to appellant's payment of child support and receipt of disability benefits, that were not included in appellant's abstract or addendum for our review. Upon resubmission, appellant Charles Rouse challenges the circuit court's distribution of settlement proceeds in an action brought for the wrongful death of appellant's son. We find no error and affirm.

We review probate proceedings de novo, but we will not reverse the decision of the probate court unless it is clearly erroneous. *See Mayberry v. Flowers*, 347 Ark. 476, 65 S.W.3d 418 (2002); *Dillard v. Nix*, 345 Ark. 215, 45 S.W.3d 359 (2001). A probate court's finding of fact is "clearly erroneous," when, although there is evidence to support it, the court of appeals is left with definite and firm conviction that a mistake has been committed. *Mid-South Adjustment Co., Inc. v. Estate of Harris*, 87 Ark. App. 139, 189 S.W.3d 518 (2004). When reviewing the

proceedings, we give due regard to the opportunity and superior position of the probate judge to determine the credibility of the witnesses. *Mayberry, supra*.

The decedent, Chuck Rouse, was sixteen year old when he was killed in 2003 during an accident at his workplace. After a hearing to decide distribution of the proceeds of the wrongful-death settlement, the trial judge ruled that the decedent's father, appellant, should receive none of the proceeds. Instead, the trial court distributed the proceeds of the settlement between the appellee mother and two siblings.

The decedent was born on August 4, 1986. Appellant and appellee were divorced in 1990. Appellee received custody and appellant was ordered to pay child support, which he paid from 1990-1993. In his argument, appellant reasons that although he had trouble in the mid 1990's because of drug use, he was now sober and had begun developing a stronger bond with his son. He blamed a disability and unemployment for his failure to financially support his son. He explained that whatever the relationship with his son was in the past, the two can have no relationship in the future, and appellant's loss should be compensated.

Arkansas Code Annotated section 16-62-102(a)(1) addresses wrongful-death actions and provides, in pertinent part, that whenever the death of a person is caused by a wrongful act, neglect, or default such as would have entitled the party injured to maintain an action and recover damages in respect thereof if death had not ensued, then the person that would have been liable had death not ensued shall be liable to an action for damages, notwithstanding the death of the person. The beneficiaries of the wrongful-death action are: (1) the surviving spouse, children, father, mother, brothers, and sisters of the deceased person; (2) persons, regardless of age,

standing in loco parentis to the deceased person; (3) persons, regardless of age, to whom the deceased stood in loco parentis at any time during the life of the deceased.

In *Bell v. Estate of Bell*, 318 Ark. 483, 885 S.W.2d 877 (1994), our supreme court noted that the distribution of wrongful-death proceeds invokes the trial court's discretion in some measure and that the appellant has the burden to show that the trial court was wrong and that prejudicial error was sustained. The court also discussed the historical distinction built into the wrongful-death statute between the proceeding to determine the liability and computation of damages recoverable from the tortfeasor and the proceeding to determine the apportionment of the award.

The trial court shall consider the best interests of all the beneficiaries in apportioning the proceeds. Ark. Code Ann. § 16-62-102(h). Subsection (f) of the statute directs that, if the case is tried, the sum fixed for damages shall be that which is "fair and just compensation for the pecuniary injuries, including a spouse's loss of the services and companionship of a deceased spouse and mental anguish resulting from the death, to the surviving spouse and next of kin of the deceased person." The factors set forth in subsection (f) also guide the probate court's determination of the apportionment of the settlement proceeds in those cases where the issue of damages is not tried. *Douglass v. Holbert*, 335 Ark. 305, 983 S.W.2d 392 (1998). Damages for mental anguish shall be awarded to each beneficiary on an individual basis. *See Dale v. Sutton*, 273 Ark. 396, 620 S.W.2d 293 (1981).

The statute does not require that each beneficiary be awarded an amount, and appellant cites no case law for the proposition that a beneficiary must receive some portion of the award in order for the award to be valid. He merely concludes that the trial court was required to

distribute the settlement in the best interests of all beneficiaries and that it was not in appellant's best interest to receive nothing. Appellant also laments that "[e]ven though the two did not have an ideal relationship, [appellant] lost the chance to ever repair his relationship with his son." Once again appellant cites no authority for the proposition that the loss of opportunity to repair a relationship is recoverable in a wrongful-death award.

While appellant asserts that the trial court abused its discretion by considering the testimony of appellee to the exclusion of the other testimony, the determination of witnesses' credibility is soundly within the trial court's duties. *See Mayberry, supra*. Appellee testified that she believed that appellant deserved none of the proceeds because he only showed up after his son's death, but was never involved in his son's life. While appellant argues that there was no testimony that appellant did not suffer a loss, there was also no testimony describing his suffering. A review of the testimony, including appellant's own characterization of his relationship with his son, does not leave us with a definite and firm conviction that a mistake has been committed. Accordingly, we affirm.

Affirmed.

GLADWIN and ROBBINS, JJ., agree.